Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-690

COTTON BAKING COMPANY, INC.,
Petitioner,

versus

LOCAL 369, BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAMUEL LANG
WILLIAM F. BANTA
Kullman, Lang,
Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, La. 70160
Attorneys for Petitioner

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TABLE OF CONTENTS

Page

OPINIONS BELOW 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT

1. The Decision Below Misapplies And Conflicts With Important Principles Of Federal Labor Law Articulated By The Supreme Court In The *Steelworkers* Trilogy 6

2. The Decision Below Conflicts With The Decisions Of The Same And Other Courts On The Question Of Whether Punitive Damages Are Appropriate In Arbitration 11

3. The Decision Below On The Question Of Attorneys' Fees Conflicts With A Recent Decision Of This Court 15

CONCLUSION 19

CERTIFICATE OF SERVICE 20

APPENDIX

(1) Opinion of the Court of Appeals 1a

(2) Judgment of the Court of Appeals 9a

(3) Order of the Court of Appeals Denying Petition for Rehearing 10a

(4) Opinion of the District Court 12a

(5) Award of the Arbitrator 22a

(6) Grievance of the Union 40a

TABLE OF AUTHORITIES

Page

Cases:

Alyeska Pipeline Service Co. v. The Wilderness Society, ___ U.S. ___, 44 L.Ed.2d 141, 95 S.Ct. ___ (May 12, 1975) 16,17,18

International Assoc. of H.E.F.I.L.A., Loc. 66 v. Leona Lee, 489 F.2d 1032 (4th Cir. 1974), enforcing ___ F.Supp. ___, 84 LRRM 2165 (W.D. Tex. 1973) 13

Local 127, United Shoe Workers of America, AFL-CIO v. Brooks Shoe Mfg. Co., 298 F.2d 277 (1962) 13

Local No. 149, I.U., U.A., A.&A.I.W. v. American Brake Shoe Co., 298 F.2d 212 (1962) 18

Operating Engineers v. Mid-Valley, Inc., 347 F.Supp. 1104 (S.D. Tex. 1972) 11,12,15

Publishers' Assoc. of New York City v. Newspaper and Mail Deliverers' Union of New York and Vicinity, 18 Labor Arbitration Reports 855 (1952) 14

Sims v. Amos, 409 U.S. 942, 34 L.Ed.2d 215 17

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L.Ed.2d 972, 980 (1957) 6

United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960) 4,6,7,8,9

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) 4,6,7,8,9

TABLE OF AUTHORITIES (Continued)

Page

United Steelworkers of America v. United States Gypsum Co., 492 F.2d 173 (5th Cir. 1974) 13,18

United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) 4,6,8,9

Statutes:

National Labor Relations Act
Sec. 203(d) 3,6
Sec. 301(a) 3,17

28 U.S.C. Sec. 1254(1) 2

Other Authorities:

Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956) 10

Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362 (1962) 10

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SUPREME COURT OF THE UNITED STATES
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COTTON BAKING COMPANY, INC.,
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LOCAL 369, BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Cotton Baking Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 18, 1975. That decision reversed and remanded the decision of the United States District Court for the Western District of Louisiana.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix 1a) is officially reported at 514 F.2d 1235. The decision of the District Court is reported at 377 F. Supp. 1172. (Appendix 12a).

JURISDICTION

The decision of the Court of Appeals was entered on June 18, 1975. Appendix 9a. A timely petition for rehearing or rehearing en banc was denied on September 25, 1975 (Appendix 10a), and this petition for certiorari was filed within ninety (90) days of that date. A thirty (30) day stay of the Court of Appeals' judgment has been granted to permit the filing of this petition. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Does a labor arbitrator's authority to determine a contract violation preclude federal court review of whether the arbitrator's remedy derives its essence from the contract?

2. Does the general authority vested in arbitrators by this Court pursuant to Section 301(a) of the National Labor Relations Act to determine violations of labor contracts include the special authority to remedy such violations with an award of punitive damages, where the parties have neither expressly nor impliedly provided for penalties in their contract?

3. Should federal courts punish, by the imposition of attorneys' fees, a party to a contract for resisting enforcement of an arbitrator's award of punitive damages where the contract does not provide for such damages, penalties are unprecedented in arbitration, and two separate federal district courts had ruled the same arbitrator to be in excess of his contractual authority with awards of punitive damages?

STATUTES INVOLVED

Section 301(a) of the National Labor Relations Act, as amended (61 Stat. 156, 29 U.S.C. Sec. 185[a]), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

For the convenience of the Court, Section 203(d) of the same Act (61 Stat. 153, 29 U.S.C. Sec. 173[d]) is also set forth here:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

STATEMENT OF THE CASE

This is *not* a case where the employer has refused to accept an arbitrator's decision that it violated the contract. Instead, the issue is a far more perplexing one of whether arbitrators possess the inherent authority to remedy a breach of contract with an award of punitive damages. This case presents the question of whether the authority granted by this Court to arbitrators in the famous *Steelworkers*[1] trilogy is without boundaries, or whether courts have reserved to themselves the right to determine whether novel remedies for breach of contract such as punitive damages are within the framework of promoting collective bargaining and arbitration.

The Company has two separate unions representing two groups of employees at its bakery. In an attempt to increase efficiency, the Company instructed relay drivers (members of the outside union) to assist porters (members of the inside union) in the unloading of old bread from trucks at the end of each day. The B & C Union (representing the inside employees) objected to the assignment, contending that this unloading chore had to be performed exclusively by their members. The Company contended that relay drivers were paid for a guaranteed number of daily and weekly hours, and drivers with shorter runs should use their idle time to help unload. Appendix 13a, 14a. The B & C Union filed a formal grievance (Appendix 39a) complaining that the work had been taken away from their bargaining unit in violation of their contract, but not claiming any monetary damages or other relief except for a return of all the unloading to porters.

1 *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

The Company willingly submitted the dispute to arbitration, and later accepted and effectuated Arbitrator Britton's decision that the work belonged exclusively to the B & C Union. However, the Company took strenuous exception to the arbitrator's award of damages equalling a year's wages to the B & C Union as part of the remedy for breaking the contract, because this amounts to punitive damages which are not authorized by the contract and contrary to federal labor law. The B & C Union then filed suit to compel the Company's compliance with the arbitrator's entire award, but the District Court concluded: "The portion of the arbitrator's decision finding that Cotton violated its contract by allowing non-B & C employees to perform B & C work must be affirmed. The award of one year's porter's wages, however, represents punitive damages and cannot be allowed to stand." Appendix 17a. The District Court then refused to enforce the portion of the arbitrator's monetary award which represented a penalty and rejected the B & C Union's request for attorneys' fees (the District Court did rule that the Company should pay to the B & C Union the amount of dues that would have been paid into their treasury by a porter for one year, as such money was compensatory and proper). Appendix 18a-20a.

The Court of Appeals reversed "because we conclude that under the decisions in the *Steelworkers* trilogy the parties are bound by the arbitrator's decision in this case. . . . A dominant theme of these cases is that the federal judiciary must, in instances in which the arbitrator is acting within the bounds of his contractual authority, defer to the arbitrators' decision on the merits of the dispute." Appendix 2a; 4a. It is upon this issue that certiorari is now being sought — whether this Court, in the *Steelworkers* trilogy, abdicated judicial review of remedies and relinquished to arbitrators full freedom and discretion for devising remedies for contract violations found, regardless of the type of remedy and its impact upon collective bargaining.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Misapplies And Conflicts With Important Principles Of Federal Labor Law Articulated By The Supreme Court In The *Steelworkers* Trilogy.

In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972, 980 (1957) this Court concluded "that the substantive law to apply in suits under Section 301(a) is federal law which the courts must fashion from the policy of our national labor laws." Congress, in Section 203(d) of the Act, and this Court in the *Steelworkers* trilogy sought to promote and encourage utilization of arbitration as a means of reducing industrial strife. In one of the *Steelworkers* trilogy cases, *United Steelworkers v. American Mfg. Co.*, 363

U.S. 564, 566 (1960), this Court interpreted Section 203(d) of the Act by saying "that [statute's] policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." And in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, the third of the three, this Court mentioned "the need for flexibility" in formulating remedies in arbitration. But in that same paragraph of the same case, this Court emphasized that the expansion of the role and authority of arbitrators in the trilogy was not without limitation:

> Nevertheless an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Arbitrator Britton's remedy of monetary damages in this case is highly improper and amounts to dispensing "his own brand of industrial justice" for several reasons. First, the grievance itself, which determines the scope of the arbitration hearing, requests only the return of the work in question ex-

clusively to the B & C Union — there is no mention of any type of monetary relief requested.[2] Appendix 39a. Secondly, neither the two grievants nor any member of the B & C Union itself were in any way monetarily injured by the decision of the Company to have another union's relay drivers help the B & C porters unload the trucks.[3] Therefore, the award of monetary damages to the B & C Union must be classified as punitive. Finally, there is absolutely no language in the collective bargaining agreement between the Company and the B & C Union suggesting Arbitrator Britton had the authority to award punitive damages.

Concluding that the arbitrator correctly exercised the authority vested in him by the parties in their contract and by this Court in the *Steelworkers* trilogy to find a breach of the contract does not, as the Court of Appeals apparently concluded, preclude judicial review of whether the arbitrator's *remedy* exceeds his authority. A teaching of the trilogy is that *all aspects* of an arbitrator's award must be derived from the essence of the contract. In neither the trilogy nor any other Section 301 case has this Court instructed federal courts to abstain from review of the remedy where an arbitrator's decision finding a violation is ground-

2 "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582.

3 Arbitrator Britton himself found: ". . . [N]o present member of the unit lost pay as the result of the Company's action . . . ." Appendix 39a. And the District Court ruled, "It is impossible to classify the arbitrator's award of monetary damages to B & C as compensatory damages because there is no injury *to the Union* for which compensation in the amount above suggested would be appropriate. . . . There is no relationship between the monetary award and the breach except a punitive one." Appendix 18a, 19a.

ed to the contract. The Court of Appeals failed to classify Arbitrator Britton's monetary award but relied upon its view that the judiciary should not restrain the remedial flexibility of arbitrators once a violation of the contract is found. Appendix 5a. Their concept that arbitrators were given the power by this Court in the *Steelworkers* trilogy to grant punitive damages where there is no assent is an improper and unprecedented extension of the principles articulated in those three decisions which this Court should correct by granting certiorari.

The fundamental error of the Court of Appeals is its failure to recognize the trilogy rests upon the concept that collective bargaining is a consensual process. Here the Company consented to have disputes such as whether one of its two unions has the exclusive right to perform the job of unloading relay trucks submitted to an arbitrator. But the Company neither directly nor impliedly consented to a process under which it could be assessed a monetary penalty. Parties at the bargaining table do not contemplate or consider drafting or agreeing to language under which either could be punished — that's simply not the way collective bargaining works. This novel and dangerous approach to remedying breaches of contract, endorsed by the Court of Appeals, necessarily has a serious and widespread impact on management, labor, and the process of collective bargaining. Acceptance of the Court of Appeals' interpretation of the *Steelworkers* trilogy that arbitrators possess the power to punish losing parties would stimulate avoidance of grievance and arbitration procedures which, in turn, would promote instead of reduce industrial strife.

The policy behind Section 203(d) and the trilogy is to encourage management and labor to harmoniously solve industrial disputes without work stoppages by agreeing to vest impartial arbitrators with the power to resolve grievances unsettled by the parties.[4] Since the trilogy, arbitration has been embraced and extensively utilized as a means for peacefully resolving industrial disputes. But heretofore each party could calculate with precision what was at stake and how much each could possibly lose. Potential remedies such as reinstatement, backpay, and return to status quo were predictable, understood, and accepted. This feeling of certainty has helped make arbitration work. But if the view of the court below is allowed to stand, the certainty will be gone, replaced by a fear of the unknown, a concern for being punished. This fear and concern will give pause to all parties who have previously accepted, without question, an arbitration clause as a *quid pro quo* for a ban on strikes. Vesting arbitrators with the power to punish will tend to destroy the harmonious employer-union relationships encouraged in the trilogy and undermine the policy expressed in those cases of promoting arbitration. The compelling necessity to allay these legitimate fears and concerns argues forcefully for review of the present case by this Court.

The misconstruction of the trilogy by the Court of Appeals suggests the principles announced by this Court in those cases are ripe for reexamination, clarification and possible limitation. In the trilogy this Court enlarged the authority of arbitrators

4 See Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362 (1962).

because of their intimate knowledge of the "law of the shop." But this concept is concerned with applying shop rules and compensating the injured party — not penalizing the party found in violation of the contract. Part of the reason for this is that parties to a contract must continue working together to resolve the endless flow of disputes, regardless of the award in any particular case. The power to punish is simply too subjective, uncertain, and inappropriate for the industrial arbitration arena.

In sum, certiorari should be granted to correct the misconception of the Court of Appeals that this Court extended to arbitrators in the trilogy ultimate and unreviewable discretion in fashioning remedies for breaches of contract, and to make clear that federal courts must not abandon their role of monitoring arbitrators to ensure their entire awards are consistent with the overall objective of promoting private parties to engage in collective bargaining.

2. The Decision Below Conflicts With The Decisions Of The Same And Other Courts On The Question Of Whether Punitive Damages Are Appropriate In Arbitration.

Arbitrator Britton awarded punitive damages in this case even though a federal district court had vacated his previous award of punitive damages to a union in another contract interpretation dispute involving assignment of work. See *Operating Engineers v. Mid-Valley, Inc.*, 347 F. Supp. 1104 (S.D. Tex.

1972).[5] The District Court below cited with approval *Mid-Valley, Inc.*, and its rationale (Appendix 19a) but the Court of Appeals found that decision inapplicable.[6]

There is simply no other appellate court decision recognizing arbitrators have such broad remedial power. Even prior decisions in the United States Court of Appeals for the Fifth Circuit have emphasized the *compensatory* nature of damage awards by ar-

5 After pointing out the contract in that case did not give Arbitrator Britton authority to award punitive damages, Judge Noel ruled:

> Exemplary damages are almost never allowed for breach of contract. Courts require malice, ill will, or conscious disregard of the consequences before assessing damages beyond the level of injury compensation. Where, as here, the Company's objection to hiring men was made in good faith and was not without merit, the law of equity would not allow punitive damages. McCormick, DAMAGES §77 et seq. (1935) . . . .
>
> * * *
>
> This Court is of the view that no 'possibly plausible' reading of those documents could provide the arbitrator power to penalize a party as he did . . . . The arbitrator was simply 'dispensing his own brand of industrial justice' without authority. *United Steelworkers v. Enterprise Wheel & Car Corp., supra*, at 597. To ignore this clearly ultra vires aspect of the award would be to abandon any judicial review of arbitration.

Operating Engineers v. Mid-Valley, Inc., 347 F. Supp. at 1110.

6 The Court of Appeals failed to recognize that Cotton's breach of the contract was not willful, flagrant, or repeated. There was no showing of malice, ill will, or conscious disregard of the consequences on the part of Cotton in assigning to relay drivers, members of another union who had idle time, the task of helping members of the B & C Union unload the relay trucks. Obviously, the Company was merely attempting to improve efficiency, eliminate waste, and prevent featherbedding. These objections are legitimate, if not noble.

bitrators, and at least inferentially rejected punitive damages.[7]

In a Section 301 suit in the Third Circuit, a union attempted to collect punitive damages from an employer which had deviously breached the runaway shop provision of its contract. Even though that court found the company guilty of flagrant violation of the National Labor Relations Act as well as willful and malicious breach of contract, punitive damages were *not* assessed. *Local 127, United Shoe Workers of America, AFL-CIO v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (1962).

The Supreme Court of the State of New York vacated an award of punitive damages as contrary to judicial

7 In *International Assoc. of H.E.F.I.L.A., Loc. 66 v. Leona Lee*, 489 F.2d 1032 (5th Cir. 1974), enforcing ___ F. Supp. ___, 84 LRRM 2165 (W.D. Tex. 1973), the union requested punitive damages but the arbitrator, with the apparent approval of both the district court and the Fifth Circuit, ruled that such damages were improper. In *United Steelworkers of America v. United States Gypsum Co.*, 492 F.2d 173 (5th Cir. 1974), a case cited in the decision below, the arbitrator's approach in devising monetary remedy was to *compensate* the union and not *punish* the employer. That remedial award was specifically found to be grounded in contract and neither arbitrary nor capricious. See 492 F.2d at 730, where the Fifth Circuit ruled: "The nexus between the breach of the reopener clause and the method selected to remedy the contract is sufficient to support the conclusion that the remedy 'draws its essence' from the contract." The Court of Appeals erred in failing to find that the present award by Arbitrator Britton does not pass this test.

policy, even though the collective bargaining agreement authorized the arbitrator to assess damages.[8]

Therefore, the Court of Appeals' decision is in conflict with (1) the Supreme Court's *Steelworkers* trilogy wherein federal courts were commissioned with the task of reviewing arbitration awards to ensure compatibility with the objectives of federal labor law and to prevent arbitrators from abusing the discretion vested in them by this Court; (2) the Fifth Circuit's own past decisions which are grounded upon compensating the injured party and not punishing the transgressing party; and (3) other courts of appeal as well as a state supreme court which have specifically rejected punitive damages as inappropriate for arbitration.

Arbitrator Britton's remedy of punitive damages in this case on the heels of a Federal District Court rejecting the same award in an almost identical case

8 In *Publishers' Assoc. of New York City v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, 18 Labor Arbitration Reports 855 (1952), the New York Supreme Court ruled principles of contract law overrode the express language in the contract authorizing punitive damages:

> Actual damage is measureable against some objective standard — the number of pounds, or days, or gallons or yards; but punitive damages take their shape from the subjective criteria involved in attitudes toward correction and reform, and courts do not accept readily the delegation of that kind of power. *Id.* at 856.
>
> * * *
>
> The general rule that arbitrators are not bound by technical rules of law, and under a broad enough submission may interpret law as well as fact, is no adequate answer to this kind of legal infirmity which attaches itself to the nature of the submission itself. The court will not lend its power to the enforcement of the kind of a decision in arbitration which it would neither allow nor enforce as the subject of an action maintained before it directly. *Id.* at 858.

demonstrates the arrogance of and abuse of discretion by some arbitrators. The decision below by the Court of Appeals only encourages arbitrators such as Mr. Britton to frustrate instead of promote collective bargaining by devising incorrect remedies and applying unsound principles with total disregard of the judiciary.

3. The Decision Below On The Question Of Attorneys' Fees Conflicts With A Recent Decision Of This Court.

The full explanation for the Company's refusal to comply with Arbitrator Britton's monetary award is its sincere and firm belief that the award is violative of both the contract and the law. As previously stated, Arbitrator Britton issued a monetary award in a similar case which was rejected by a federal district court. See *Operating Engineers v. Mid-Valley, Inc.*, *supra*, 347 F. Supp. at 1109, an unreversed case heavily contributing to the Company's decision to refuse to comply with the same arbitrator's monetary award in the instant case. The District Courts in both *Mid-Valley, Inc.* and this case ruled that Arbitrator Britton had exceeded his authority with an award of monetary damages in an assignment of work dispute where neither the grievants nor the union had suffered monetary injury. This should lend ample foundation and justification to the Company's refusal to comply with the award.

Despite the above facts, the Court of Appeals first stated "the general rule in this circuit that a trial court has authority to award attorney's fees where it deter-

mines that a party was unjustified in refusing to abide by an arbitrator's award," and then remanded to the District Court the issue of whether attorneys' fees in this case would be proper.

The above approach taken by the Court of Appeals to the issue of attorneys' fees is in direct conflict with *Alyeska Pipeline Service Co. v. The Wilderness Society*, ___ U.S. ___, 44 L. Ed. 2d 141, 95 S. Ct. ___ (May 12, 1975), where this Court ruled:

> In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this 'American rule'; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals. *Id.* at 147.

* * *

It appears to us that the rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C.

> § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation. . . . *Id.* at 159.

In concluding, this Court wrote that the "American rule" against awarding attorneys' fees "is deeply rooted in our history and in Congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals." *Id.* at 161.

It is clear from *Alyeska* that an award of attorneys' fees to the prevailing party absent statutory approval is improper. And, of course, neither Congress in any arbitration statute nor this Court in fashioning federal labor law under Section 301(a) has authorized such payment of attorneys' fees. Thus, the Court of Appeals should have specifically affirmed the District Court's rejection of attorneys' fees.

The Court of Appeals also erred in applying the standard of whether a party was *unjustified* in refusing compliance with the award. In footnote 46 of *Alyeska Pipeline Service, Id.*, 44 L. Ed. 2d at 160, this Court noted its affirmance of an award of attorneys' fees in *Sims v. Amos*, 409 U.S. 942, 34 L. Ed. 2d 215, on the ground that defendant had acted *in bad faith*.

Clearly, "bad faith" is not the same standard as "without justification." After a federal court decides that an arbitrator's award should be enforced, it's easy to conclude, in retrospect, that the party was not justi-

fied in refusing to comply. But the more stringent and correct test is the one suggested by this Court — did the party refusing compliance act in bad faith? In this case the Company's reliance upon its contract, the absence of penalties in arbitration, and the presence of a federal district court decision rejecting an identical award in a previous case by the same arbitrator demonstrate the Company satisfied both standards: it acted in good faith and with ample justification. Thus, even if the Court of Appeals correctly reinstated Arbitrator Briton's monetary award, it erred in failing to reject the Union's request for attorneys' fees.

The decisions of various appellate courts on whether attorneys' fees are appropriate in arbitration cases demonstrate the chaotic status of this issue in the federal judiciary. In *Local No. 149, I.U., U.A., A.&A.I.W. v. American Brake Shoe Co.*, 298 F.2d 212 (1962) the Fourth Circuit noted the numerous cases conflicting on the issue of whether federal courts have inherent power to award attorneys' fees absent statutory authority. 298 F.2d at 214, notes 1 and 2. See also *United Steelworkers v. U.S. Gypsum Co.*, 492 F.2d 713, 734 (5th Cir. 1974).

The Supreme Court should grant certiorari for the purpose of eliminating the present confusion and correcting the past application of the loose "without justification" test by ruling that *Aleyska Pipeline Service* either prohibits any possibility of attorneys' fees in arbitration cases or limits their application to instances in which the party failing compliance acted in bad faith.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Samuel Lang
SAMUEL LANG

/s/ William F. Banta
WILLIAM F. BANTA
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160

Attorneys for Petitioner

November, 1975.

CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 33 of the Supreme Court rules, I certify that I have caused a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to be served on the following persons by mailing three copies of same via air mail, postage prepaid:

Mr. Robert J. Martin, Jr.
Adair, Goldthwaite, Stanford & Daniel, P.A.
600 Rhodes-Haverty Building
Atlanta, Georgia 30303

and

Mr. James R. Jeter
Cook, Clark, Egan, Yancey & King
Commercial National Bank Building
Shreveport, Louisiana.

This 6th day of November, 1975.

/s/ Samuel Lang
SAMUEL LANG

COUNSEL FOR
COTTON BAKING COMPANY

APPENDIX

LOCAL 369, BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO, Plaintiff-Appellant,

v.

COTTON BAKING COMPANY, INC.,
Defendant-Appellee.

No. 74-3111
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

June 18, 1975.

Appeal from the United States District Court for the Western District of Louisiana.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

GEWIN, Circuit Judge:

The appellant local of the Bakery & Confectionery Workers International Union of America, AFL-CIO (the Union) seeks reversal of the district court's order modifying an arbitrator's award of damages against an employer. See 377 F.Supp. 1172 (W.D.La. 1974).

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir. 1970, 431 F.2d 409.

Because we conclude that under the decisions in the *Steelworkers* trilogy[1] the parties are bound by the arbitrator's decision in this case, we reverse.

The facts are undisputed. The Union and the Cotton Baking Company (the Company) are parties to a collective bargaining agreement which explicitly provides for a grievance procedure to cover "any grievance or dispute . . . whether on the part of the Union or the Employer." Should the parties fail to settle the grievance, the matter "may be submitted to an arbitrator for the final and binding arbitration thereof."

The basis of the union's complaint was the company's alleged assignment of work to members of another union in violation of the collective bargaining agreement. The job in question was the unloading of old bread from relay trucks when they returned to the company's bakery at the end of each day. The union, claiming that member dock porters were entitled to perform this work, challenged the company's assignment of the unloading to the relay truck drivers, members of another union. The union filed a grievance petition with the company, and when that failed, submitted the matter to "final and binding arbitration" pursuant to the contract. The arbitrator found that the union had exclusively unloaded the trucks at the company docks for at least four years prior to the execution of the present contract and that this arrangement concerning work assignments thereby became incorporated in the collective bargaining agreement. Under

1 United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

the disputed work assignment policy in this case, one dock porter remained in his original capacity while a second one was transferred to another job which actually commanded a higher salary. The arbitrator nonetheless concluded that the union was damaged by the denial of a work opportunity:

> While the job is the lowest paid classification in the Agreement, all employees have a contractual right under the seniority provisions to bump down to that job should a layoff occur. The fact that there is one less job to bump down to, erodes the bargaining rights provided for in the agreement.
>
> Moreover, there is no question that there is presently one less job for the members of the union. The transfer resulted in the loss of a job by the unit which seriously affects the job security of its members . . . Whether it is one job or many, a contract is a contract and rights there under need be enforced. Otherwise, the jobs of a Union under the Agreement could be taken away one by one and a greater percentage of the jobs under its jurisdiction ultimately eroded.

The arbitrator thus concluded that the company had violated the contract by denying dock unloading tasks to union members and he awarded monetary damages to the union in the amount of one year's wages for a dock porter. In this Section 301[2] action to enforce the arbitrator's award, the company does not dispute the determination that the union members are entitled to

2 Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

this job. Rather it challenges the remedy as an imposition of punitive damages and consequently beyond the scope of the arbitrator's power. The district court accepted the company's argument and reduced the damages award to $78.00, the amount of dues lost by the union because of the work loss. We reverse because we find that the arbitrator's decision was rendered pursuant to authority granted by the collective bargaining agreement and because we recognize that the judiciary owes considerable deference to the decisions of labor arbitrators.

The controlling standards for federal judicial scrutiny of labor dispute arbitration are articulated in the Supreme Court's *Steelworkers* trilogy. A dominant theme of these cases is that the federal judiciary must, in instances in which the arbitrator is acting within the bounds of his contractual authority,[3] defer to the arbitrator's decision on the merits of the dispute.

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is

3 As the Court noted in United Steelworkers of America v. Enterprise Wheel & Car Corp., *supra*,

> an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's awards manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

363 U.S. at 597, 80 S.Ct. at 1361, 4 L.Ed.2d at 1428.

> right or wrong is a question of contract interpretation for the arbitrator.

United Steelworkers of America v. American Mfg. Co., *supra*, 363 U.S. at 568-69, 80 S.Ct. at 1346, 4 L.Ed.2d at 1407. See also International Union of Dist. 50, U.M.W. v. Bowman Transportation, Inc., 421 F.2d 934 (5th Cir. 1970); Gulf States Telephone Co. v. Local 1692, International Brotherhood of Electrical Workers, 416 F.2d 198 (5th Cir. 1969) and cases cited in fn. 4; Safeway Stores v. American Bakery & Confectionery Workers Internat'l Union, Local 111, 390 F.2d 79 (5th Cir. 1968). Furthermore, the arbitrator must also be left free to decide more than which party is right or which party is wrong. Having found a contract violation, he must fashion a remedial order to bring the parties' actions in conformity with the contract and make reparation for past infringements. A collective bargaining agreement may not specify the relief required for every conceivable contractual violation, so the arbitrator must often rely on his own experience and expertise in formulating an appropriate remedy. In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. at 597, 80 S.Ct. at 1361, 4 L.Ed.2d 1428. See also United Steelworkers of America v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1973); International U. of Dist. 50, U.M.W. v. Bowman Transportation, Inc., *supra;* Lodge No. 12, Dist. No. 37, Intl. Assn. Machinists v. Cameron Iron Works, 292 F.2d 112, 119 (5th Cir. 1961), cert. denied, 368 U.S. 926, 82 S.Ct. 361, 7 L.Ed.2d 190 (1961); Tobacco Workers Int. U., Local 317 v. Lorillard Corp., 448 F.2d 949 (4th Cir. 1971).

The district court reasoned that the arbitrator's award could not be compensatory since the company's assignment of work to the rival union caused no injury to the union here involved. Since the damages awarded were not compensatory, the court concluded, they must be punitive, and as such are not permitted under the contract. The court placed substantial reliance on International Union of Operating Engineers v. Mid-Valley, Inc., 347 F.Supp. 1104 (S.D. Tex. 1972). In that case an arbitrator accepted the union's contention that the contract required that the company hire men to operate certain machinery. The arbitrator ordered that the company hire men to perform this task but the company did not comply. The arbitrator thereupon ordered that the employer pay the union damages equal to wages which would have been earned from the time the machinery became operative until the date of his decision, and from the date of the decision until that time at which the company complied. The district court disallowed the award as to the first time segment, finding that it was punitive rather than compensatory since it bore no relationship to en-

couraging compliance with the contract and constituted payment which union members did not earn.

While we render no judgment as to the validity of the *Mid-Valley* decision, we find its rationale inapplicable to this case, and even if applicable, it is not binding on this court. The provisions of the collective bargaining agreement relating to grievance and arbitration procedures are brief but unequivocal; they apply to "any dispute . . . whether on the part of the Union or the Employer." Acting pursuant to the authority granted in this provision, the arbitrator concluded that the company's work assignment policies denied the union members work opportunities to which they were entitled under the contract. Not only were fewer union members drawing salaries from the company because of this arrangement, but the job security of all union members was indirectly effected because there were fewer jobs to "bump down" to in the event of layoffs. After examining these circumstances, the arbitrator determined that the union was monetarily damaged and ordered an appropriate award.[4] The record indicates that the contract authorized arbitration of the dispute in question and supports the arbitrator's choice of remedies. In these circumstances, the district court erred in modifying the arbitrator's award.

---

4 The parties apparently anticipated the possibility of a monetary award based on a dock porter's salary. Prior to submission of the dispute to arbitration, the parties agreed that this matter was a proper one for arbitration and that should the arbitrator enter a monetary award, the amount should be limited to the wages of a dock porter for six months.

The district court also denied the union's request for attorney's fees, relying on the general rule in this circuit that a trial court has authority to award attorney's fees where it determines that a party was unjustified in refusing to abide by an arbitrator's award. See International U. of Dist. 50, U.M.W. v. Bowman Transportation, Inc., *supra*. After concluding that the damages award was punitive and hence unwarranted, the district court noted simply that "[f]or obvious reasons, the refusal [to comply] was not without justification in this case." 377 F.Supp. at 1176. Because we have reached a different conclusion on the merits of this dispute, we remand the case to the district court for a determination as to the propriety of awarding attorney's fees.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-3111
Summary Calendar

D. C. Docket No. CA 74-413

LOCAL 369, BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,
Plaintiff-Appellant,

versus

COTTON BAKING COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under

submission upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: June 18, 1975

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

September 25, 1975

TO ALL COUNSEL OF RECORD

No. 74-3111 — Local 369, Bakery & Confectionery Workers International Union of America, AFL-CIO vs Cotton Baking Co., Inc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ BARBARA KREI
Deputy Clerk

cc: Mr. Robert J. Martin, Jr.
Mr. James R. Jeter
Mr. William F. Banta

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION
74-413

LOCAL 369, BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO

versus

COTTON BAKING COMPANY, INC.

FOR PLAINTIFF

MESSRS.
Robert J. Martin, Jr.
Adair, Goldthwaite, Stanford
& Daniel, P.A.
600 Rhodes-Haverty Building
134 Peachtree Street, N.W.
Atlanta, Georgia 30303

Of Counsel:
James R. Jeter
Cook, Clark, Egan, Yancey & King
600 Commercial National Bank Building
Shreveport, Louisiana 71161

FOR DEFENDANT

William F. Banta
Kullman, Lang, Inman & Bee
P. O. Box 60118
New Orleans, Louisiana 70160

TOM STAGG — DISTRICT JUDGE

OPINION

This litigation involves a suit by a labor union to enforce an award of an arbitrator pursuant to a collective bargaining agreement. The Complainant is Local 369, Bakery and Confectionery Workers International Union of America, AFL-CIO, and the Respondent is the Cotton Baking Company, Inc. The matter is before this Court on Respondent's Motion for Judgment on the pleadings pursuant to Rule 12(c) F.R.C.P.

STATEMENT OF FACTS

The Complainant (hereinafter called "B & C") is the union representing one of two groups of employees working at the Respondent's (hereinafter called "Cotton") plant. B & C filed a grievance under the terms of its contract with Cotton. The subject of the grievance was B & C's objection to Cotton's having members of another union doing B & C's work. Specifically, B & C objected to Cotton's instructing relay drivers to assist in the unloading of old bread from the trucks at the end of each day. B & C contended that this was properly B & C's work, to be done by dock porters. Cotton contended that the relay drivers were paid for a guar-

anteed number of daily and weekly hours and drivers with shorter runs were to use their idle time to help unload. A grievance procedure was initiated under the collective bargaining agreement, but failed. The matter was then submitted to arbitration, the next step provided for in the agreement.[1] The arbitrator decided

1 "19. *NO WORK STOPPAGE GRIEVANCE PROCEDURE:* There shall be no stoppage of work, strikes nor slowdowns, nor any other interference with production on the part of the Union, or the employees it represents during the life of this contract, or any lockout on the part of the Company.
"It shall not be a violation of this Agreement for the Union to require its members to refuse to go through or work behind any primary picketline sanctioned by the Bakery and Confectionery Workers' International Union, AFL-CIO and it shall not be cause for disciplinary action for any employee to refuse to go through or work behind any such picketline.
"A. The Union shall appoint a Grievance Committee of five (5) men. Should any grievance or dispute arise, whether on the part of the Union or the Employer, such grievance shall be submitted, if requested by either party, in writing. If such grievance is presented in writing, it must be done so within seven (7) days after the occurance (sic) of the event giving rise to the grievance or it shall be considered waived.
"B. The Grievance Committee and the Employer shall promptly meet and earnestly endeavor to adjust and settle the grievance.
"C. If a settlement is not reached within thirty (30) days after the delivery of the grievance to the other party, a grievance may be submitted to an arbitrator for the final and binding arbitration thereof. If the parties are unable to agree on the arbitrator within seven (7) calendar days after service upon the other party of the request for arbitration, then he shall be chosen by lot from a list of seven (7) names of arbitrators to be furnished by the Federal Mediation & Conciliation Service under its procedures. No individual employee shall have the right to invoke arbitration, this right accruing to the Union as the representative of all employees covered hereby.
"D. The compensation and expense of the arbitrator shall be equally divided between the Company and Union."

the work issue in favor of B & C, and, additionally, awarded a sum equal to a year's porter's wages to the Union. In his decision on the monetary award, he said, "* * * it is clear economic benefit has accrued to the Company at the expense of the Union. It has saved the amount of wages of a Porter for a period of one year. Accordingly, it is further directed that the Union be awarded the wages which the Company took as what must be considered as a windfall resulting from its breach of contract."

B & C seeks to enforce this award. Cotton, however, contends that the arbitrator exceeded his authority and resists enforcement of the award.

CONCLUSIONS OF LAW

There are no disputed facts. All parties agree as to the fact that Cotton made a work assignment to relay drivers to do unloading, that the matter was submitted to arbitration, and that the award was made. The only issue is the singular legal issue as to whether, as a matter of law, the arbitrator exceeded his authority.

Jurisdiction is conferred on this Court pursuant to Section 301(a) of the Labor-Management Relations Act (29 U.S.C.A. 301 [a] and 28 U.S.C.A. 1337.) B & C is an unincorporated labor organization and Cotton an employer, both within the meaning of Section 301(a).

The Supreme Court in the case of *Textile Workers Union v. Lincoln Mills*, S.Ct. 1957, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972, held that Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185,

provides a basis for the enforcement of collective bargaining agreements and the arbitration provisions contained in such agreements.

Guidelines for Courts in cases dealing with the decisions of arbitrators have been set out in the Supreme Court's important trilogy of labor arbitration cases, the "Steelworkers Trilogy".[2] This package of jurisprudence defines the District Court's role relative to the arbitrator's. These cases mandate an enforcement of the arbitrator's award, whether or not the Court agrees with the arbitrator's interpretation of the contract, so long as it is based on the collective bargaining agreement.

The United States Court of Appeals for the Fifth Circuit has adhered to this mandate by repeatedly upholding the enforcement of arbitrator's decisions. E. G., *International Association of H.E.F.I. & A., Loc. 66 v. Leona Lee*, 5th Cir., 1974, 489 F.2d 1032, *Steelworkers v. U.S. Gypsum Co.*, 5th Cir., 1974, 492 F.2d 713, *Safeway Stores v. American Bakery and Conf. W.I.W., Local 111*, 5th Cir., 1968, 390 F.2d 79. The Court in *Leona Lee* said, "In a suit to enforce an arbitration award, the Court's role is very narrow. It cannot review the merits of the award, even in deciding the question of arbitrability, nor can the Court attempt to interpret the collective bargaining agreement. Insofar as the arbitrator's decision concerns interpretation of the collective bargaining agreement, the

2 *United Steelworkers v. American Mfg. Co.*, 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 754, 80 S.Ct. 1347, 4 L.Ed.2d 1409; *United Steelworkers v. Enterprise Wheel & Car Corporation*, 1960, 363 U.S. 593, 77 S.Ct. 912, 1 L.Ed.2d 972.

Courts cannot overrule the arbitrator because their interpretation of the agreement is different or because they disagree with the arbitrator's fact-findings." *International Association of H.E.F.I. & A., Loc. 66 v. Leona Lee*, supra, 489 F.2d 1032, 1033, 1037.

The Supreme Court in *U.S. Steelworkers of America v. Enterprise Wheel & Car Corp.*, 1960, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424, noted, however, that while the arbitrator is allowed this independence he is "confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, Courts have no choice but to refuse enforcement of the award." *Enterprise Wheel & Car*, supra, 363 U.S. at 597.

Although Cotton has refused to accept the arbitrator's decision in its entirety, its primary objection is to the monetary award. In light of the Court's role relative to the arbitrator's, this Court must decline to delve into the wisdom of the arbitrator's interpretation of the contract. That portion of the arbitrator's decision finding that Cotton violated its contract by allowing non-B & C employees to perform B & C work must be affirmed.

The award of one year's porter's wages, however, represents punitive damages and cannot be allowed to stand.

The grievance in this case was filed by the Union on January 30, 1973, protesting the actions of Cotton in transferring work which was historically and contractually that of B & C employees to employees within another bargaining unit. At the time of the dispute, the contractual wage rates for porters was fixed at $3.02 per hour. On the basis of 40 hours per week, for 50 weeks, the total amount of the arbitrator's monetary award was approximately $6,040.00. The arbitrator reasoned, "*While no present member of the unit lost pay as the result of the Company's action*, it is clear that the economic benefit has accrued to the Company at the expense of the Union. It has saved the amount of wages of a porter for the period of one year. Accordingly, it is further directed that the Union be awarded the wages which the Company took as what must be considered as a windfall resulting from its breach of contract." (Emphasis added.) It is impossible to classify the arbitrator's award of monetary damages to B & C as compensatory damages, because there is no injury *to the Union* for which compensation in the amount above suggested would be appropriate. The Union was not humiliated or degraded by a disagreement of such minimal proportions and, therefore, such an award cannot be found to be compensatory. Granted, the Union conceivably did lose a year's dues from the Porter vacancy, and this loss of dues would be compensatory and allowable. As the arbitrator, himself, stated, "While no present member of the unit lost pay * * *", there was, therefore, no loss on the part of any B & C member, the arbitrator alludes to none and the Union claimed none. At the hearing on this matter in this Court, Cotton emphasized that the Union complained of no damages at the arbitration stage; the Union did not contest this point. The Union did argue that

the arbitrator could have intended the award of wages for some unspecified damages, but could only speculate as to what these damages might be. While the arbitrator in one breath says, "* * * benefit has accrued to the Company at the expense of the Union * * *", a reading of the phrase in full context makes it clear that the award of wages in an approximate amount of $6,040.00 was *clearly intended as exemplary damages.*[3]

This Court takes notice of the Fifth Circuit holding in *Gypsum*, supra, 492 F.2d 713, at 731, where the Court said, "* * * in the absence of a different standard established by the agreement, the arbitrator did not, contrary to the command of the arbitration clause, 'add to, modify, detract from or alter (the agreement) in any way.' " That Court, however, noted a nexus between the breach and the remedy; in this case, there was none. As we noted above, there was no damage suffered or complained of; the arbitrator went as far as to say there was no loss. There is no relationship between the monetary award and the breach except a punitive one. Such an award can only be held to be extraordinary in view of a relatively *de minimus* dispute.

Judge Noel in the Southern District of Texas, in deciding the case of *International Union of Operating Engineers, Local No. 450 v. Mid-Valley, Inc.*, S.D. Texas 1972, 347 F.Supp. 1104, held that while the arbitrator's power to fashion remedies is indeed broad

3 This case is readily distinguishable from *Leona Lee*, in that the arbitrator in Leona Lee rejected the claim of exemplary damages. See the District Court's discussion of the award, *Asbestos Workers v. Leona Lee*, W.D. Texas 1973, 84 L.R.R.M. 2165, 2168.

and the remedies are valid so long as they draw their essence from the contract, punitive damages are drastic and cannot be implied.

The Court reasoned that a "* * * contractual consent to so drastic a 'remedy' for simple breach cannot be implied * * * In this case neither the contract clause, nor the simple question submitted suggests authority for exemplary damages * * * (The) Union did not suffer any loss of wages or other money damage because of the breach * * * the award cannot be justified as substantive damages * * * this portion of the award does not encourage prospective compliance thereby enforcing the contract; it only punishes for past breach. * * *"

Again, the arbitrator determined that the Company breached the contract, that the disputed assignments should have been the Union's. It is not the Court's prerogative to question the arbitrator's interpretation of the contract. His remedy, in part, was to order the assignment of the work in question to the Union. There is a nexus here between the breach and the remedy. In this, he was correct. The arbitrator went further and ordered Cotton to pay a year's wages to the Union to punish it for receiving the "windfall". There is no relationship between this portion of the remedy and the breach. In this, he was incorrect.

For the above-stated reasons, the portion of the money award in excess of a sum equal to the Union dues for one dock porter for one year will not be enforced. The balance of the award was properly made, and the arbitrator's interpretation of the contract on work assignments will be enforced.

ATTORNEY'S FEES

The Union has asked for attorney's fees in this case. Attorney fees may be awarded when the Court determines that the party refusing to accept the award has done so without justification. *United Steelworkers of America v. United States Gypsum Co.*, supra, 492 F.2d 713, at 734. That Court recognized *Local 140, UAW v. American Brake Shoe Co.*, 4th Cir., 1962, 298 F.2d 212, as being the primary case in the area and noted two earlier decisions by the Fifth Circuit citing *American Brake.*[4] For obvious reasons, the refusal was not without justification in this case. Accordingly, attorney's fees will not be allowed.

Counsel for the respondent will prepare and submit an appropriate Order in accordance herewith pursuant to our Local Rule 9(e).

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 11th day of July, 1974.

/s/ TOM STAGG
TOM STAGG
U. S. DISTRICT JUDGE

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4 *Dallas Typographical Union, No. 173, v. A. H. Belo Corp.*, 5th Cir., 1967, 372 F.2d 577; and *International U. of Dist. 50, UMW v. Bowman Transportation, Inc.*, 5th Cir., 1970, 421 F.2d 934.

In the Matter of

COTTON BAKING CO., INC.
Shreveport, Louisiana

AND

LOCAL NO. 369, BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL UNION, AFL-CIO

APPEARANCES

For the Company:

William F. Banta, Attorney and Spokesman; J. W. Watson, Plant Manager; Albert Parker, Plant Superintendent; Jack Mertens, Dock Superintendent

For the Union:

Robert J. Martin, Jr., Attorney and Spokesman; Joe Tom Grafton, Secretary

ISSUE

Whether the Company violated the collective bargaining agreement by transferring the work of unloading relay trucks from the job classification of Porter to a job classification in another unit? If so, what should the remedy be?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution.

Through mutual agreement of the parties, the undersigned was selected as Arbitrator to hear and decide the matter in dispute.

The date for the Hearing of this matter was set for December 13, 1973, and the Hearing was held on that date in the Holiday Room of the Holiday Inn-West Motel, 4900 Greenwood Road, Shreveport, Louisiana, commencing at 10:00 o'clock a.m.

At the commencement of the Hearing it was stipulated by the parties that this matter was properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in this matter.

After the Hearing, it was agreed that the parties would file Post-Hearing Briefs with the Arbitrator by placing such Briefs in the mails not later than midnight December 28, 1973. The Post-Hearing Brief filed by Local No. 369, Bakery and Confectionery Workers' International Union, AFL-CIO (hereinafter referred to as "Union"), was received by the Arbitrator on January 2, 1974. The Post-Hearing Brief filed by the Cotton Baking Co., Inc., Shreveport, Louisiana (hereinafter referred to as "Company"), was received by the Arbitrator on January 3, 1974.

SUMMARY STATEMENT OF THE CASE

The Company is engaged in the baking industry and maintains a production facility in Shreveport, Louisiana. There are two separate and independent

bargaining units at the Company's Shreveport bakery. The production employees are represented by the Union. The Relay Drivers who are included in the sales unit are represented by an independent union, i.e., Independent Bakery Employees Union, not affiliated with the AFL-CIO.

From the production plant in Shreveport, Louisiana, "Relay Trucks" take the product to distant "relay stations" which are distribution points from which salesmen secure the product to distribute it to retail outlets. Upon return to Shreveport from the relay stations, the trucks contain empty boxes and oftentimes stale bread; the trucks are backed against a dock and the empty boxes are unloaded. The trucks are then "spotted" in a position to be reloaded by Porters with product for the next run.

The job of unloading the relay trucks has been performed exclusively by Dock Porters from 1968 to November 1972. The work was performed by two Porters: one would be located physically in the truck and hand the empty boxes to another who would stack them. (This procedure was changed around 1970 when a skate conveyer was secured and the procedure was for one Porter to lift the boxes out of the truck onto the conveyer where they would slide down to a Porter on the floor who would stack them.)

In October, 1972, the Company's contract with the Independent Bakery Employees Union (Company Exhibit No. 1) expired. During the negotiations for a new contract, the Company agreed to convert the pay for the Relay Drivers from salary plus mileage to an

hourly rate. In addition to agreeing to this change, the Company also agreed to another provision in the contract guaranteeing all sales and relay employees seven hours of work per day and forty hours per week. The quid pro quo for the Company's acquiescence on these two amendments was the agreement that Relay Drivers and others in the sales and relay unit would perform all available work whenever necessary to consume the guaranteed hours.

When the Relay Drivers (sales and relay unit) changed from salary plus mileage to an hourly rate of pay in November, 1972, the Company determined that since several Relay Drivers usually completed their runs in less than seven hours, it would assign to Relay Drivers with the time, the task of participating in the unloading of empty boxes and stale bread from relay trucks.

The new duty of the Relay Driver involves standing on the back of the truck and placing empty boxes and boxes of stale bread onto a skate conveyer which transports the boxes to a Dock Porter on the ground. After the truck has been unloaded in this manner, the Relay Driver "spots" the truck. All Relay Drivers who have not put in their guaranteed hours by the time they complete their run are expected to help unload the relay truck in the above manner. If a Relay Driver consumes eight hours on his run, he would clock out and go home and his unloading and spotting functions would be performed by other Relay Drivers who were still short of the guaranteed time. If the relay trucks become lined up while waiting for other trucks to be unloaded, those Relay Drivers frequently help the

Relay Driver at the dock perform his function of placing the boxes on the skate conveyer.

In November 1972, the Union learned that the Company intended to transfer the job of unloading the truck to the Relay Drivers and only allow the Porters to pick the boxes from the lower part of the conveyer and stack them. Mr. Grafton, Union Secretary, agreed that a Relay Driver could assist the Porter who unloaded the trucks in the body of the truck, but at all times a Porter would have to be in the truck and be primarily responsible for the work.

In January 1973, the Porter who unloaded the truck was removed from the Dock Porter's job and the Relay Driver substituted on the basis that the compromise in practice proved to be inefficient and wasteful. The Porter who unloaded the truck was transferred to another Porter's job and the Dock Porter's position was not filled.

On January 30, 1973, the Union filed a grievance on behalf of Alphonse McCoy and James Woodward, which states in relevant part as follows (Joint Exhibit No. 1):

> "The undersigned was notified by the dock superintendent at the Shreveport plant that effective Sunday, January 28, 1973, the job of unloading those trucks containing empty boxes and stale returns (as distinguished from unloading trucks from Natchez and Alexandria loaded with product) has been taken away from the unit and assigned to employees out-

> side the unit. This work both contractually and historically, has belonged to the Unit and by assigning it outside of the Unit, Management has violated the contract. Local Unit 369 formally grieves.* * *"

Provisions of the labor agreement between the Company and Union in full force and effect for a period of three (3) years from May 2, 1971 to April 27, 1974 (hereinafter referred to as "Agreement") (Joint Exhibit No. 2), considered pertinent to this dispute by the parties are as follows:

> "1. *RECOGNITION:* The Employer hereby recognizes AFL-CIO, CWIU, LOCAL #369, as the exclusive bargaining agent for all employees working under the provisions of this Agreement.
> * * *
> 10. *SENIORITY:* When new jobs are available or when vacancies occur, employees shall be advanced to better-paying operations or better jobs on the basis of seniority and qualifications, providing they are physically able to do the work required. Job opening to be posted for three (3) days. Seniority shall apply plantwide.
>
> When new jobs are created, the Company will negotiate to establish an equitable and a fair wage rate between Porter and Dough Mixer scale for said job.

When an employee performs regularly scheduled work for two (2) hours or more at a rate above his classification, he shall receive rate for time worked on entire shift.

Any employee upgraded to a higher classification shall be considered to be on a trial basis in his new classification for a maximum of one (1) month. In the event of unsatisfactory performance in this new classification during the trial period, he may be returned by the Company to his former classification and rate of pay.

When there is a cutback or elimination of work, after one (1) week an employee may be assigned to a lower paid classification provided there is no longer sufficient work in the previous classification to permit him to return to that classification on his seniority.

Seniority shall be lost for any one of the following reasons:

A. If the employee quits.
B. If the employee is discharged for just cause.
C. If the employee is absent for two (2) consecutive days without notifying the company.
D. If the employee does not report to work within five (5) working days after being recalled from a lay-off.

Approved sick leaves shall not affect the seniority rights of the employee.

A new employee shall be considered as a probationary employee until he has completed thirty (30) days of continuous employment at which time his name shall be added to the seniority list and his seniority shall date back to the first day of his continuous employment. Retention in the Company's employ during the probationary period shall be entirely within the discretion of the Company.

11. *SEVERANCE OR TERMINATION PAY:* The Company agrees to give a weeks notice or the equivalent in salary to any employee who is discharged, except for just cause, or laid off provided he has been in the service of the Company for six (6) months or longer.

If an employee has been in the service of the Company one (1) year or longer and replaced by automatic equipment, he shall recieve one (1) months severance pay.

The employees agree to give the Company one (1) weeks notice of their quitting. Failure of any employee to do so will cause him to lose all vacation, sick leave and any other benefits that have accrued to him.

Employees are entitled to retain their jobs on the basis of good behavior, efficiency, honesty and their ability to perform work satisfactory

to the production of high quality products. The Company shall have the right to discipline or discharge any employee who fails to meet the foregoing conditions and particularly, but without limitation, may discharge an employee because of reporting to work under the influence of alcoholic beverages, the use of intoxicating liquors during working hours, violation of safety rules, absence without leave, excessive absenteeism, dishonesty, habitual neglect or carelessness resulting in damage to Company property or equipment, sleeping while on duty, failure to maintain a high level of personal hygiene, or for any other just cause.

All provisions of the preceding paragraph are subject to the grievance procedure.

* * *

15. *SCHEDULE OF OPERATIONS:* The planning and scheduling of production shall be the exclusive function of Management.

* * *

20. *ELIMINATION OF WASTE:* The Union shall cooperate with the Company in a concerted effort for product quality, reduction of losses, breakage and rework and use its best efforts to see that each employee shall observe work received from other employees and shall not cover up, process or pass on defective work to the next operation.

* * *

26. *TECHNOLOGICAL CHANGES IN OPERATIONS:* The Company has the right to

determine job procedure and methods and to put in technological improvements and the Union will cooperate in any work to improve plant operations.

* * *

29. *LABOR MANAGEMENT COOPERATION:* The Union recognizes the responsibilities imposed upon it as the exclusive bargaining agent for the employees and realizes that in order to provide maximum opportunities for continuing employment, good working conditions and better than average wages, the Company must be in a strong market position, which means it must produce at the lowest possible costs consistent with fair labor standards. The Union, through its bargaining position, assumes a joint responsibility in the attainment of these goals. It further agrees that the Company is entitled to exercise the utmost flexibility in operations, scheduling of work and direction of the work force, so long as it is not inconsistent with any of the expressed provisions of this Agreement.

The Union, therefore, agrees that it will cooperate with the Company and support its efforts to assure a full day's work on the part of its members; that it will actively combat absenteeism and any other practices which restrict production. It further agrees that it will support the Company in its efforts to eliminate waste in production, conserve materials and supplies; improve the quality of

workmanship; prevent accidents and strengthen goodwill between the Employer, the employee, the customer and the public."

POSITION OF THE PARTIES

The Position of the Union:

The Union takes the position that the work of unloading the returning relay trucks is historically and contractually the work of the Union and the unilateral transfer of the work outside of the unit was improper, arbitrary and contrary to the Agreement.

The Position of the Company:

It is the position of the Company that the grievance should be dismissed for the following reasons: (1) the Agreement does not prohibit the Company from assigning "production work" to distribution employees; in fact, the Agreement specifically grants to the Company flexibility in assigning and scheduling work so that efficiency can be promoted and waste eliminated; (2) the Company's motivation is void of arbitrariness and union animus; instead it is solidly grounded upon the legitimate business goals of improving productivity and reducing waste; (3) the effect upon the Union is negligible: Relay Drivers now help unload the five to seven trucks returning to the Bakery, which consumes approximately twenty minutes per truck while their primary duties of driving and unloading the trucks remain unchanged and the Dock Porter continues to devote the same amount of time to the unloading function; only one of seventy

unit jobs (the lowest) has been affected; (4) there is no other work to which the idle Relay Drivers could be assigned; (5) the unloading of the relay trucks is a function highly integrated with the Relay Drivers' regular duties instead of being remote from or unconnected with them; in fact, the function in question is much more closely identified with sales and relay work than production work; (6) in the past and in other closely related circumstances Relay Drivers performed and are performing the same unloading function; and (7) other arbitrators have dismissed grievances filed under similar circumstances.

OPINION

In this matter numerous reasons are given by the Company as support for its decision to transfer the work of unloading the returning relay trucks outside of the production unit to the Relay Drivers in the sales unit. Based upon the record presented to the Arbitrator, it is his considered judgment that these grounds advanced by the Company in justification of its action cannot for the reasons hereinafter given be accorded persuasive significance.

The Company states generally that it is difficult to draw a jurisdictional line between the work of the Union and that of the Independent Bakery Employees Union, and the most effective way of operating its business is to have the jurisdictional line waiver with changing conditions. This argument should not be given significant effect here. A clear and direct line can and has been drawn between the jurisdiction of the Union and the Independent Bakery Workers Union. It

therefore seems to the Arbitrator that to allow the Company the right to unilaterally change this line would be to permit it to show favoritism to a union. While the line between the jurisdiction of the unions does not have to be hard and fast, it cannot be changed unless it is done properly in negotiations with the unions who lose jurisdiction.

It is contended by the Company that the Agreement gives it the right to schedule work and direct the work force and therefore it has the power to transfer job duties from one unit to another. The basis for this contention is that under a contract containing no express ban on the transfer of work outside the bargaining unit a company is generally within its rights in transferring work out of the bargaining unit. As to this the Company urges that the present Agreement (Joint Exhibit No. 2) does not prohibit it in any way from assigning Relay Drivers to help with the unloading function. To the contrary, the Company maintains that under Articles 20 and 29 of the Agreement, the Union has pledged its cooperation in the elimination of waste and inefficiency and agreed that "the Company is entitled to exercise the fullest flexibility in operations, scheduling of work and direction of the work force . . ." These Articles, according to the Company, when taken together, allow it discretion and flexibility in the scheduling of work so that waste and inefficiency may be eliminated. The Company contends therefore that it may here take whatever action is necessary to eliminate its wasteful and inefficient operations, including assigning certain work out of the bargaining unit, where the problem is misuse of labor and personnel.

In the view of the Arbitrator, a collective bargaining agreement assumes jobs and job protection; if this were not an implied part of the agreement, the entire Agreement could be sidestepped by the rearrangement and reassignment of jobs. Surely this is not anticipated by the parties and the resulting doctrine is that management may not, without the consent of the Union, shift work and job duties so that it is transferred out of the unit. The jobs become a part of the Agreement and are locked into the Agreement lacking the mutual consent of the Union. If changes of this nature are to be made the time is at the bargaining table when the contract is being renegotiated. For it is at this time that the parties are on an equal basis and if economic action is taken by the Company it can be answered in kind by the Union.

The Agreement before the Arbitrator (Joint Exhibit No. 2) contains no management-rights clause. While management here does have the right to schedule work and direct the work, it does not have the right to arbitrarily and unilaterally decide which unit is to perform the work. The contract in question was signed when the job of unloading the relay trucks was exclusively assigned to the Porters; the classification of Porter is established in the Agreement and a wage-rate given to it; there is a seniority provision in the Agreement giving employees the right to be assigned to a lower paying classification when there is a cutback or elimination of work. The job classifications agreed to and the work performed pursuant to the contract and past practice become the vested rights of the Union although not expressed in the contract. Job classification clauses give rise to an implied provi-

sion that unit work is to be performed by unit employees.

Porters are shown by the record to have unloaded the relay trucks for years. Relay Drivers were supposed to aid in this function during the 50's and on Friday during the 60's. During the 60's up until around 1968 the Relay Drivers were to help unload the returning relay trucks on Fridays because this was a heavy day on the return run due to the return of stale bread. The record further reflects that this was not a popular duty on the part of the Relay Drivers since they were on salary and often times would leave as soon as they docked their trucks.

It is thus clear from the record that since 1960 the job of unloading the trucks has been that of the Porters with only intermittent help on Fridays from the Relay Drivers. From this evidence the Arbitrator is constrained to conclude that the unloading of the trucks has always been primarily the duties of the Porters. Only from time to time, intermittently, have the duties been performed by the Relay Drivers. At those times it appears the Relay Drivers assisted in the function and they did not take primary responsibility for the duties.

Additionally, the evidence shows that the Porters have exclusively unloaded the relay trucks upon return to the Shreveport production center since 1968. Past practices when not changed during negotiations become a part of the contract. Here it is clear that for at least four years prior to the execution of the Agreement the work duties in question were the exclusive responsibility of the parties. This assignment of this

work duty has become an integral part of the Agreement. Contractually, the job duties of unloading the relay trucks are those of the members of the Union and without its consent cannot be transferred to other job classifications without the unit.

In justification of the change the Company maintains that no employee was laid off and no employee lost any work. While it is true that Mr. Woodward has continued to work in the Dock Porter's job and that Mr. McCoy was transferred to other work when he was taken off of the dock and subsequently bid on and did secure a higher paying job when one came up through attrition, this does not establish that no damage was sustained by the Union and the workers or that there is not immediate and potential damage to job security.

The Dock Porter's job which McCoy handled was not filled after he was transferred away and the unloading duties were given to the Relay Drivers. The residual job duties of cleaning the dock and loading the relay trucks were taken over by Woodward. This failure to fill the Dock Porter's job cannot reasonably be overlooked.

While the job is the lowest paid classification in the Agreement, all employees have a contractual right under the seniority provisions to bump down to that job should a layoff occur. The fact that there is one less job to bump down to, erodes the bargaining rights provided for in the Agreement. Moreover, there is no question that there is presently one less job for the members of the Union. The transfer resulted in the loss of a job by the unit which seriously affects the job

security of its members. This cannot properly be treated as an insignificant matter or one that reasonably comes within the de minimis doctrine as the Company contends. Jobs for its members are perhaps the most important issue for an organization of workers. Thus, neither the contention of the Company that a significant number of employees are not involved here nor that one job is not a high percentage of the bargaining unit can be considered by the Arbitrator as meritorious. Whether it is one job or many, a contract is a contract and rights thereunder need be enforced. Otherwise, the jobs of a Union under the Agreement could be taken away one by one and a greater percentage of the jobs under its jurisdiction ultimately eroded.

Finally, the Company argument as to the economic hardship caused to it by not transferring the work to the Relay Drivers and its allegation of economic justification cannot be treated as justifying the divestiture of a union of jurisdiction. Additionally, it is noted that one of the reasons for transferring these duties was to give the drivers the responsibility of spotting their own trucks. The evidence, however, shows that these duties generally are performed by the same two Relay Drivers who have short runs. (The Relay Drivers with long runs log in overtime every day). The same applies to the counting of the return boxes as the same two Relay Drivers generally performed this function.

AWARD

For the reasons given, the grievance is sustained and it is directed that the jobs of unloading the relay trucks be restored to the Porters.

While no present member of the unit has lost pay as the result of the Company's action, it is clear that economic benefit has accrued to the Company at the expense of the Union. It has saved the amount of the wages of a Porter for a period of one year. Accordingly, it is further directed that the Union be awarded the wages which the Company took as what must be considered as a windfall resulting from its breach of contract.

DATE:
February 15, 1974

/s/ RAYMOND L. BRITTON
Raymond L. Britton, Arbitrator

American Bakery and Confectionery Workers'
Local 369 • AFL-CIO
304 East 77th St.
Shreveport, La. 71106
Phone 861-3129

January, 30, 1973

Mr. R. Gene Cotton, President
Cotton Baking Company, Inc.
2524 Samford
Shreveport, Louisiana

Re: Grievance —
(1) Alphonse McCoy
(2) James Woodard

Dear Mr. Cotton:

Pursuant to that collective bargaining agreement presently in effect between the undersigned and Cotton Baking Company, Inc., the undersigned on behalf of the captioned men, files the following grievance:

The undersigned was notified by the dock superintendent at the Shreveport plant that effective Sunday, January 28, 1973, the job of unloading those trucks containing empty boxes and stale returns (as distinguished from unloading trucks from Natchez and Alexanderia loaded with product) has been taken away from the unit and assigned to employees outside of the unit. This work, both contractually and historically, has belonged to the Unit and by assigning it outside of the Unit, Management has violated the contract, Local Unit 369 formally grieves.

Pursuant to the contract grievance procedure, the undersigned requests an immediate meeting between its Grievance Committee and the employer. The Grievance Committee appointed pursuant to the contract consists of:

Joe T. Grafton
W. J. McCart
L. C. Frazier
R. T. Webb
Ramie Penn

This is a matter of grave concern to the undersigned and we request the earliest possible meeting in order that this grievance may be resolved. Please notify the undersigned as to the date, time and place of the grievance meeting.

Yours truly,
/s/ JOE T. GRAFTON
Secretary
Local Union No. 369
Bakery and Confectionary
Workers International Union, AFL-CIO